MISCELLANY.

Argument of Counsel—Referring to Accused as "Sweet-Smelling Shrub," etc.—In White *v.* State, 19 Ga. App. 230, 91 S. E. 280, it was held that the trial court did not err in refusing to declare a mistrial because the prosecuting attorney, in his concluding argument to the jury, referred to the accused, a negro, as "a sweet-smelling shrub," "big Injun," and "big Ike," as, if the effect of such language was prejudicial, the harmful effect was removed by the action of the judge in directing the attorney to desist from such references, and in ruling out the remarks complained of, and by the attorney's withdrawal of the remarks and his apologies to the court.

"Delmonico's" in Court.—Judge Mayer, in In re Delmonico's, 256 Fed. 414, has the following to say of New York's famous place of entertainment:

"Delmonico's dates back to 1825, and was established about 1845 at what later became the site of the old Steven's Hotel at 7 Broadway. When croton water was introduced into the city, the occupants of the house fronting on Bowling Green erected a fountain, consisting of a rough stone structure, over which the water was conducted by means of a pipe. The design called forth considerable adverse criticism from visitors from out of the city, and the incident and mention of Delmonico's are thus recorded by the poet John Godfrey Saxe:

'And now Mr. Brown
Was fairly in town,
In that part of the city they used to call "down,"
Not far from the spot of ancient renown
As being the scene
Of the Bowling Green,
A fountain that looked like a huge tureen
Piled up with rocks, and a squirt between.

* * * * * *

And he stopped at an Inn that's known very well,
"Delmonico's" once—now "Steven's Hotel";
(And to venture a pun which I think rather witty.
There's no better Inn in this Inn-famous city!)'

'(Note: The Greatest Street in the World—Broadway. By Stephen Jenkins, Knickerbocker Press.)'

"About 58 years ago, in 1861, Delmonico's moved from the Bowling Green section to Broadway and Fourteenth Street. In 1876 the

next move was made to Twenty-sixth Street and Fifth Avenue, and in 1897 the establishment again moved, this time to Forty-fourth Street and Fifth Avenue, where it now is. These moves of this famous restaurant mark the progress of the active life of the city as it gradually developed toward the north, although each move was attended with the usual foreboding prophecy that the location was too far uptown and ahead of its time.

"Throughout these many years of existence, now rapidly reaching a century, the effort of Delmonico's has been to adhere to some simple and comfortable traditions. The theory is that the relation of host and guest still exists. Some of the well-known figures have gone, such as the white-haired John (quite typical), who, it is said, after three score and ten of a life of urbanity towards the patrons and thrift for himself, now spends a vigorous and happy old age on his New Jersey farm.

"The guest still continues to have identity. He is respectfully, but cheerfully greeted by name as he enters his favorite room or takes his favorite seat. While across the table he is discussing the affairs of the day, or closing a business transaction, or telling his tribulations to his lawyer, the waiter does not hover about, but approaches only when he is beckoned. In the quiet and dignified room in which at the end of the day busy men of the city are wont to dine with each other, one may hear oneself think as well as talk, without the din of the orchestra, and with only the occasional faint sound of the strains of music from the more pretentious rooms where those disposed to be more formal may gather.

"In the banquet halls great and important addresses have been made at public gatherings by leaders of thought in their day and generation. Here, too, many young folks have gone forward into life with the good wishes of their relatives and friends. Within these walls the debutante has attended her first formal party, under circumstances different only as to time and dress from those which her mother and grandmother remember.

"Throughout all the years, the effort has been to keep for the New Yorker and the visitor from elsewhere a place of dignity and quiet, and to resist those innovations, some of which have resulted in eliminating the individual and depriving the patron of that individual attention for which at least some guests still crave.

"Those who know this history and these characteristics have been loath to see Delmonico's go. It is their loyalty which in part, at least, has been responsible for possibilities of a future, and the hope (in which this court will assist) is that the business may continue, and go on, so that the institution may be kept alive, and not merely find its place on a page of some book reminiscent of New York."

Kinship.—In Central R. Co. *v.* Roberts, 91 Ga. 517 (18 S. E. 315), and Avery *v.* Armour Fertilizer Works, 17 Ga. App. 458, 87 S. E. 698, the following lines are quoted:

> "The groom and bride each comes within
> The circle of the other's kin;
> But kin and kin are still no more
> Related than they were before."

Omissions from Law Books.—In Rogers & Heath *v.* Powell Co., 14 Ga. App. 189, 191, 80 S. E. 550, Pottle, J., delivering the opinion of the court, said: "If a law-book should be considered worthless because on one occasion a lawyer was unable to find in it a decision directly on the point under investigation, very few legal publications could stand the test."

Scriptural Quotations.—In Modlin *v.* Smith, 13 Ga. App. 259, 260, 79 S. E. 82, the court said: "The scriptural dictum, 'The laborer is worthy of his hire,' is as much applicable to lawyers as to others."

"Every man has a right to the enjoyment of a good reputation unassailed, as he has a right to life, liberty, or property. It was long ago said that 'A good name is rather to be chosen than great riches.' Prov. XXII: 1." Spence *v.* Johnson, 142 Ga. 267, 269, 82 S. E. 646.

Theaters and Shows—Injury to Spectator at Baseball Game.—The common law right of recovery as regards one who knowingly or indifferently incurs a risk in the course of his employment not necessarily incident thereto finds expression in the cases of Southcote *v.* Stanley, 1 H. & N., 247; Wilkinson *v.* Farrie, 1 H. & C. 631; Chapman *v.* Rothwell, El. B. & E 168; also Cooley on Torts (3rd Ed.), 1042-1057. Further distinctions taken on the liability of an occupier of premises are found in the case of Indermaur *v.* Dames, L. R., 1 C. P., 274, where the static relations between such occupiers and one injured thereon are classified. Situations involving these questions may arise under a variety of circumstances. Probably the greater number grow out of the relation of master and servant. Sullivan *v.* New Bedford, etc., R. Co., 190 Mass. 288; American Car and Foundry Co. *v.* Duke, 218 Fed. 437. In a recent decision, the Supreme Court of Washington was called upon to determine whether one who pays admission to the grand stand to see a baseball game, knowing the nature of the game and having a choice of screened or exposed seats, choosing a seat exposed to wild throws and foul balls, may show in evidence as proof of negligence, defendant's plans for the park, which called for

screens to protect the area in which he sat. The court held the evidence admissible and that the plaintiff's right to recover was properly submitted to the jury who found in his favor. Kavafian *v.* Seattle Baseball Club Association (Wash. 1919), 177 Pac. 776.

Cases precisely in point are few. In Wells *v.* Minneapolis Baseball and Athletic Association, 122 Minn. 327, 142 N. W. 706, it was held that if plaintiff chose an unprotected seat, it was properly submitted to the jury to determine whether in so doing she had assumed any risk arising from defendant's failure to protect the area where she sat with screening. In Crane *v.* Kansas City Baseball Exhibition Company, 168 Mo. App. 301, 153 S. W. 1076, the court upheld a directed verdict for defendant on the theory that defendant having provided a choice of protected and unprotected seats had performed its duty and that plaintiff in choosing an exposed seat assumed the risks incident thereto. In Edling *v.* Kansas City Baseball Exhibition Company, 181 Mo. App. 327, 168 S. W. 908, it was held a question for the jury to decide whether or not plaintiff had been guilty of contributory negligence or had assumed the risk of being hit by a ball in taking a seat in the protected portion of the stand but in line with a defective opening in the screen. The jury decided in favor of the plaintiff. These cases all agree with and contain statements similar to the general proposition laid down in Crane *v.* Kansas City, supra, where the court says: "We think the duty of the defendants toward their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desire such protection." To what extent is this necessary? In the principal case the court says concerning appellee's choice of an unprotected seat, "by inference he was invited to that seat. There was an implied representation on the part of appellant that the seat he (plaintiff) took was reasonably safe." Such doctrine would impose upon defendants the burden of protecting those seats which in the usual course of the game would be within the ordinary range of the ball. In the Crane Case, supra, the court said: "Defendants fully performed that duty (to provide protected seats) when they provided screened seats in the grand stand and gave plaintiff an opportunity of occupying one of those."

In Wells *v.* Minneapolis, supra, the court says, "We believe that as to all who with full knowledge of the danger from thrown or batted balls attend a base ball game, the management can not be held negligent when it provides a choice between a screened and an open seat, the screen being *reasonably sufficient as to extent* and substance." In Edling *v.* Kansas City, supra, under somewhat different circumstances the injury being due to a defective opening in the screen, the court says, "Being in the business of providing a public entertainment for profit, defendant was bound to exercise reasonable care to protect its patrons against such injuries. * * *

The courts of this State have always adhered to the doctrine * * * that where one person owes a duty to another, the person for whose protection the duty exists can not be held to have assumed the risks of injury created solely by a negligent breach of duty."

In substance, the Crane Case imposes a duty upon the defendants to afford a choice of protected or exposed seats and that having done so its duty is at an end. The Minnesota court in the Wells Case adds to this requirement that the screening must be reasonably sufficient as to extent. The Edling Case goes farther and refuses to exonerate defendant on the theory that the plaintiff has assumed the risk if it be shown defendant owed plaintiff a duty to protect him against the injury. A distinction should, however, be made between the Edling Case and the others. In that case, defendant had recognized a duty to protect the area in which plaintiff sat but had negligently allowed the screen to become defective. In this connection the words of Montague Smith, J., in Crafter *v.* Metropolitan Railway Company, L. R., 1 C. P., *304, are in point. He says, "The line must be drawn * * * between suggestions of possible precautions and evidence of actual negligence such as ought to reasonably and properly be left to a jury."

The cases all agree that defendant is not an insurer of plaintiff's safety and is therefore under no duty to screen the whole stand. They are equally well agreed that defendant is under a duty to provide some protection against the dangers of the game even as to those who attend with full knowledge of these dangers. The test applied in the Crane Case imposing an obligation to afford a choice of protected or exposed seats is no doubt of some value as evidence in deciding in a given case whether or not plaintiff in choosing an exposed seat assumed the risk of being hit. As a criterion for determining the extent of the area defendant is duty-bound to screen, it has no merit. On one occasion a small attendance may find ample room behind a very limited screen, while others with a capacity audience, the defendant would be bound to screen all the seats if those attending were to have an opportunity of occupying protected seats. On the one hand, a strict application of the doctrine of assumption of risk would preclude a recovery in a majority of instances where plaintiff knew the dangers incident to the game. On the other hand, denying its applicability to such cases as these would tend to throw the entire burden on the defendant. Experience has shown that the sections of the stand directly behind the batter, and for a distance along the first and third base lines to be those exposed to the greatest danger. It is the occupants of these seats who are most apt to feel the driving effect of a pitched ball deviated from its course by glancing off the bat. In imposing an absolute duty on the baseball association to protect its patrons

against this danger, the courts will have fixed the relative rights and liabilities of the parties in a manner consistent with legal theory and practical application.—Michigan Law Review.

Why Noise Is Annoying.—"The countryman, accustomed to little noise in the daytime and none at all at night, is greatly annoyed and disturbed, when he visits the city, by the noisy rattle of vehicles rolling over paved streets and by the grinding sound of street cars on the rails. But a few days' sojourn will accustom his ear to the new sounds, and they cease to annoy him. A person unaccustomed to sleeping on a moving train finds it difficult to sleep in a Pullman car, but after a few days' and nights' travel on a long journey he sleeps more soundly when the train is in motion than when it is at rest. People dwell in cities by the sea where the sound of the breakers is never hushed, and by the roaring cataract that thunders on forever, and the sounds, which at first were disturbing, soon become restful music to their ears. These illustrations show that sounds are annoying to us more because of our unfamiliarity with them than on account of their character or volume." Brokaw *v.* Carson, 74 W. Va. 340, 81 S. E. 1133, 1134.

Lawyers and the Moral Law.—There is nothing but a healthy moral sentiment of truth and justice behind the enforcement of the decrees of the judicial department of the government, and the judicial department of our nation and of every civilized country is committed to the hands of the lawyer.

The preservation of the integrity and independence of the judiciary against the insidious assaults made upon it through such proposals as the recall of judicial decisons and of the judges, and the bitter opposition to confirmation of judicial appointments on the ground that the decisions of the appointee when occupying some other judicial office were not corrupt, but simply not favorable to special interests, belongs peculiarly to the bar; and is a distinct public service the profession should be zealous to render.

The safety of our constitution and the peaceful preservation of our bill of rights, and of true social order, depends upon the integrity and purity of the courts and the fidelity, intelligence and patriotism of the bar. The peaceful settlement of business disputes, the orderly adjustment of controversies between those classes of our citizens whose interests are in conflict, the enactment and enforcement of just and sensible laws that will permit a safe and sane development of the business of the country without detriment to the public welfare, are matters that touch the vital interests of all classes;

and are indeed the most vexing and perplexing of modern problems. These problems are alike the task and the opportunity of the lawyer of today.

The lawyer not only contributes indirectly to the business interests of the country by the part he plays in conserving social order. The profession has a more intimate relation to business. It may no longer be rightly said that the lawyer is not a producer. He is really a vital part of every great business enterprise. We are such a muchly governed people, it has become almost absolutely necessary that any important business must have the guiding and directing hand of some lawyer. The business interests usually choose an attorney who is long-headed, honest, and intellectually frank, one who will tell them when they are wrong as readily and as quickly as he would tell them if they were right. If he is faithful to his trust he will steer them away from trouble, and when it arises, will be the peacemaker. The success of many enterprises is due in a large measure to the intelligent and trained business sense of some good lawyer. Business problems are entirely too complex in most instances to be rightly solved without the assistance of the legal profession.

There is no social idea of value that does not sooner or later draft upon the lawyer, either for its expression or its advocacy.

There is no great public question of government but challenges the talent and interest of the lawyer to its profit.

There is no reform movement but finds among its staunchest supporters the members of the bar.

There is no great business enterprise that does not profit by his training and ability.

There is no problem of modern life which may not be helped and is not helped by the lawyers of the land.

If there is ever a great world court for the settlement of disputes among nations, as private controversies are now disposed of, the lawyer will draft its governing provisions and its methods of procedure, will present the arguments and briefs upon which its decisions will be based, and will formulate its judgments.

The growing ideals of democracy will in every land in the coming years be expressed and defended by patriotic lawyers.

The progress of the world toward a larger measure of social and industrial justice will be reflected in laws written, advocated, tested and enforced by lawyers.

The responsibility and opportunity of the legal profession are great enough to challenge the highest endeavor. There is no intellect, however bright, no character however strong, that may not find inviting and congenial labor in following the calling of the law. The preservation of social order, the moulding of worthy public

opinion, the enforcement of the law, the development of the great business interests of a great country, the contributing in some degree toward the solution of the problems of the race, the furtherance of human progress, the defense of human liberty, are undoubtedly things worth while. It is the proud privilege of the lawyer to leave behind him as his most enduring monument a record of zeal and helpfulness in advancing each and all of these great causes.

It depends upon the character, intelligence and patriotism of the bar, and the purity and unselfishness of the motives that actuate them, as to whether or not their influence shall wane. So long as they are true to the eternal verities, and labor with a true vision of their glorious task they will be worth while. Both as advocate and as judge;

"God Grant the lawyer,
Large knowledge of the shifting battle lines,
And captured strongholds of the ancient fight of right and wrong
Keen vision to descern amid the tangled forests of the law,
The threadlike path of justice;
Skill to strike the subtle line of cleavage
Twixt the truth and that which mocks and apes the truth;
Supreme intent to know and do the right, and weigh out judgment with an even hand."

From an address by Hon. R. E. Wilbourn before Mississippi Bar Association.